UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Durand Evan, Charging Party, Durand Evan, Intervenor, v. Nancy Dutra, Henry Fisher, Ray Stone, Ken Hunt and River Gardens Apartments, a California Limited Partnership, Respondents.	HUDALJ 09-93-1753-8 Decided: May 13, 1997

Melvin J. Visger, Esquire
For the Respondents

David Grabill, Esquire
For the Complainant/Intervenor

Robert C. Mills, Esquire
For the Secretary and the Complainant

Before: CONSTANCE T. O'BRYANT
Administrative Law Judge

INITIAL DECISION AND ORDER ON APPLICATION FOR ATTORNEY FEES

On January 3, 1997, Intervenor Durand Evan, filed a Motion for Award of Reasonable Attorneys' Fees and Costs pursuant to 42 U.S.C. § 3613(c)(2) and 24 C.F.R.

§ 104.940(b). Respondents filed opposition to the Motion, asserting that fees incurred by the Intervenor in an administrative proceeding are not recoverable under the Fair Housing Act, 42 U.S.C. §§ 3601-3612 ("the Act"), and that even if attorneys' fees were recoverable, there are special circumstances in this case which make the recovery of such fees unjust. Intervenor filed a reply to the opposition. After considering all the parties' submissions, I find that Intervenor is entitled to a portion of the requested fees.

On November 12, 1996, I issued an Initial Decision finding for the Charging Party and the Complainant/Intervenor on the ground that the Charging Party had proved that Respondents unlawfully discriminated against Complainant/Intervenor in violation of the Fair Housing Act. Respondents had refused to provide reasonable accommodation to Mr. Evan, a disabled individual, by refusing to allow him to keep his pet cat in his apartment even after being made aware that his cat served a therapeutic purpose.

Intervenor seeks fees for Mr. Grabill, his attorney during this litigation, and for other expenses associated with the litigation. According to the affidavit filed by attorney Grabill, he expended 143.89 hours of work on the case at a rate of $200 per hour, the asserted customary rate for attorneys in his area, for a total of $28,778. Intervenor has requested that the undersigned consider granting an enhancement to the requested fee award based on an appreciation for the risk his counsel took in representing him in this case and the need to encourage other private attorneys to represent individuals such as Intervenor in this type proceeding.

Applicable Law

The Fair Housing Act, as amended, 42 U.S.C. § 3601, et seq., provides that a prevailing party in an administrative proceeding, other than the United States, is entitled to recover reasonable attorney fees and costs. 42 U.S.C. § 3612(p) provides:

> Attorneys' fees. In any administrative proceeding brought under this section, or any court proceeding arising therefrom, or any civil action under § 812 [42 U.S.C. § 3612], the administrative law judge or the court, as the case may be, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs.

A prevailing party is one whose success on significant issues achieves sought after results. *See Busche v. Burkee*, 649 F.2d 509, 521 (7th Cir.), cert denied, 454 U.S. 897 (1981); *see also Dixon v. City of Chicago*, 948 F. 2d 355, 357-358 (7th Cir. 1991).

Further, 24 C.F.R. § 104.950(b), the regulation implementing 42 U.S.C. § 3612, specifically provides for payment of attorneys' fees to an intervenor:

> To the extent that an intervenor is a prevailing party, the respondent will be liable for reasonable attorneys' fees unless special circumstances make the recovery of such fees and costs unjust.

Consistent with the above statute and regulation, an Intervenor has been found entitled to recover attorney fees in numerous administrative decisions. See *HUD v. Dedham*, 2 Fair Housing-Fair Lending, ¶ 25,031 (1992); *HUD v. Simpson*, 2 Fair Housing-Fair Lending, ¶ 25,044 (1993); *HUD v. Weber*, 2 Fair Housing-Fair Lending, ¶25,051 (1993); *HUD v. Jancik*, 2 Fair Housing-Fair Lending, ¶ 25,068 (1994); *HUD v. Ocean Sands*, 2 Fair Housing-Fair Lending, ¶ 25,070 (1994); *HUD v. Ro*, 2 Fair Housing-Fair Lending, ¶ 25,111 (1995); *HUD v. Jankowski*, 2 Fair Housing-Fair Lending, ¶ 25,112 (1995); and *HUD v. Kelly*, 2 Fair Housing-Fair Lending, ¶ 25,114 (1995).

Discussion

Respondents were found to have violated the Act and damages were assessed against them. Accordingly, Intervenor is a prevailing party and Respondents are liable for reasonable attorney fees and expenses. *Blum v. Stenson*, 465 U.S. 886 at 896 n.11 (1984). Respondents' opposition based on lack of authority to award attorney fees and costs in an administrative forum is without merit.

Respondents assert that even if this court had authority to award attorney fees, there were special circumstances in this case which would make an award of attorneys' fees unjust. The special circumstances they set forth are: (1) that there was no serious civil rights violation in this case; (2) that Intervenor did not achieve the 'excellent result' he claims in that prior to Intervenor's counsel's involvement in the case the parties had agreed to settle the case for $7,000, $1,242 more than the amount awarded in the decision; (3) that Intervenor's counsel entered his appearance in the case only two weeks before the hearing; and (4) that the administrative hearing process was created by Congress to provide for a quick and inexpensive way to resolve housing discrimination charges, and it would be patently unjust to now reward intervenor for unnecessary fees and costs incurred by his own actions.

Respondents' argument that there was no serious civil rights violation in this case is without merit. In the Initial Decision, I found that Respondents' refusal to reasonably accommodate Intervenor's disability was egregious. I awarded Intervenor $5,758 in total

damages, granted injunctive relief and imposed a civil penalty of $5,000 against Respondents. This was a serious violation.

With regard to Respondents' claim that Intervenor did not obtain an excellent result in that Intervenor recovered less than the $7,000 offered to settle the case, the Initial Decision awarded relief beyond compensatory damages, including injunctive relief and a substantial civil penalty as a deterrent to future misconduct by Respondents and others similarly situated. Although it may be appropriate to consider the compensation sought and the result obtained, the amount of damages recovered should not be the sole or even the primary indicator of the success of the litigation. *Riverside v. Rivera*, 477 U. S. 561, 574 (1986). Accordingly, the fact that Intervenor was awarded less than the amount offered to settle the case is not a special circumstance which would make an award unjust.

There is merit to Respondents' argument that due to Intervenor's counsel's late appearance in this case (less than two weeks before trial), that he should have suffered no "risk of loss" or "huge investment of time or out-of-pocket expenses" as are commonly associated with civil litigation. This is a factor which may be considered in gauging a reasonable fee, not a special circumstance which would make an award unjust.

Finally, Respondents contend that it would be patently unjust to reward Intervenor for fees and costs incurred by his attorney's participation in the case. Their claim is that Congress, in creating the administrative hearing process, intended to provide for a quick and inexpensive way to resolve housing discrimination charges, and that Intervenor's counsel's participation was unnecessary and costly. However, the awarding of attorneys' fees to an intervenor is not inconsistent with the intent of Congress. As has been indicated above, HUD's regulations expressly provide for the awarding of attorneys' fees to an intervenor under certain circumstances.

Courts have held that where Congress has charged a governmental entity to enforce a statutory provision, and the entity successfully does so, an intervenor should be awarded attorneys' fees only if it contributed substantially to success of the litigation. The inquiry into the contribution of the intervenor primarily entails determining whether the governmental litigant adequately represented the intervenor's interests by diligently prosecuting the case, whether the intervenor proposed different theories and arguments and whether the work the intervenor performed was of important value to the court. *See Donnell v. United States*, 682 F.2d 240 at 247 (D.C. Cir. 1982). Intervenor may be denied fees where his participation was unnecessary in light of the efforts of the prevailing government litigant. In this regard the "special circumstances" which would deny an award is "where, although [intervenors] received the benefits sought in the lawsuit, their efforts did not contribute to achieving those results." *Id.* at 247.

In his Motion to Intervene, counsel for Intervenor represented that Intervenor and HUD counsel had disagreements concerning the handling of this matter, and that there were potential conflicts at trial between the interests of the public, as represented by HUD in this matter, and the interests of Mr. Evan, individually. Mr. Evan desired to intervene individually so that in the event of further disagreements, he could have a voice in the action independent of HUD. In support of his position, Intervenor submitted a declaration from Robert Mills, HUD's counsel. Mr. Mills stated that during the preparation for trial it became apparent that the interests of Intervenor and the Secretary had diverged, and he advised Intervenor that he might wish to obtain separate counsel to pursue those interests. Mr. Mills then worked with Intervenor's counsel in preparing for trial, coordinating efforts and dividing responsibilities for certain issues and witnesses. Mr. Mills focused on issues relating to liability, and Intervenor's counsel took primary responsibility for developing evidence on the issue of damages. Mr. Mills believed Intervenor's counsel made a "substantial contribution to the overall outcome of the case" and that his work was not duplicative.

HUD's counsel ably and diligently prosecuted this case. Although Intervenor did not propose different theories and arguments[1], his counsel participated at the hearing, examined and cross-examined witnesses, and submitted post-trial briefs which were helpful and contributed to the results achieved. I conclude that the work he performed was of important value to the court.

Having considered all of Respondents' claims of special circumstances, I find that there are no special circumstances in this case which justify a denial of the fee application.

Reasonableness of the Requested Fee

The United States Supreme Court has stated that "the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate[2]" *Blum* at 888; *Hensley v.*

[1]Except as to the amount of damages requested. HUD requested $28,500 while Intervenor requested $85,000.

[2]Often referred to as the "lodestar" amount.

Eckerhart, 461 U.S. 424, 433 (1983). *See also Johnson v. GeorgiaHighway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974) and*Tomassoli v. Sheedy* 804 F. 2d 93, 97 n.5 (7th Cir. 1986). The burden of establishing the reasonableness of the requested rate, as well as the number of hours expended on litigation, is on the applicant.*Hensley* at 437.

Hourly rate:

The hourly rate should be "calculated according to the prevailing market rates in the relevant community."*Blum*, *supra*, at 895. Thus, the applicant must establish that the claimed rate is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Further, an attorney's expertise is a consideration in determining the rate. *Id*. at 898.

Intervenor's counsel has been in practice since 1968 and has developed a public interest law practice, specializing in housing and employment discrimination. He has handled numerous complex legal actions in state and federal courts. He was lead or associate counsel in class actions in federal court in California resulting in a fee award of $50,000 in one case and $400,000 in another. In 1994, he was awarded $75,000 in fees as part of a settlement in a complex housing action. He has also authored a handbook for tenants in eviction matters. He spends ten to fifteen hours per week, pro bono, advising and assisting housing groups and individuals on fair housing issues. He asserts that he took over representation in this case after the Intervenor was unable to find any attorneys in Mendocino county willing to handle his case.

In support of the Motion, Intervenor's counsel submitted his own affidavit, as well as declarations from two attorneys from the Sacramento, California area - Christopher Brancart and William Kennedy - both experienced practitioners in civil litigation, specializing in civil rights cases. In their declarations, both attorneys state that the prevailing market rate in the area is $200 per hour or more, and that $200 per hour is a reasonable rate for Mr. Grabill's work, given his experience and expertise in the area.

Respondents have submitted no evidence to counter the reasonableness of the hourly rate of $200, but rather assert that the requested billing rate of $200 per hour is not reasonable for litigation in an administrative proceeding, and therefore should be reduced. However, there is no distinction drawn in the Act or applicable case law between services in administrative proceedings and federal courts. *See Allen v. Shalala*, 48 F. 3d 456 (9th Cir. 1995). Accordingly, Respondents have failed to meet their burden of rebutting Intervenor's asserted reasonable hourly rate.

Upon consideration of the application and supporting declarations, I find that Intervenor has met his burden of proving that the $200 hourly rate requested is consistent with the prevailing market rate in the Sacramento, California area for lawyers with similar level of experience and expertise. I, therefore, conclude that the rate is a reasonable hourly rate to be awarded in this case.

Number of hours:

Intervenor seeks compensation for 143.89 hours of time spent in this litigation. Respondents have complained that the description of the tasks on which time was spent for billable hours is vague, unsupported and insufficiently detailed to permit a determination of the reasonableness for the purposes of award of attorneys' fees.

> In *Hensley v. Eckerhart*, supra, the Supreme Court stated that "[a] request for attorneys' fees should not result in a second major litigation" and "counsel, of course, is not required to record in great detail how each minute of his time was expended, but at least counsel should identify the general subject matter of his time expenditures." *Id.* at n.12. Compensable time includes "the total number of hours related to the case, including travel, appellate work, monitoring post-decrees and other compliance matters, pursuing the fee award and work in agency or other ancillary proceedings if this work is 'useful and of a type ordinarily necessary to secure the final result obtained from the litigation.'" *Schwemm, HousingDiscrimination: Law and Litigation*, ¶ 25.3(5)(c) at 25-64. (citations omitted.)

Intervenor's counsel has itemized time spent on various tasks during this litigation. He requests compensation for time spent meeting with his client, consulting with HUD counsel, reviewing HUD's file and documents, participating in a conference call with the administrative law judge and other counsel, interviewing witnesses, appearing at the hearing, traveling to and from the hearing, doing legal research, reviewing the trial transcript, preparing post-trial briefs on the issue of damages (initial and reply), and researching the law on, and preparing the fee petition. Each entry provides a date, the amount of time expended and the purpose for which the time was expended. *See HUD v. Simpson, supra,* at pg. 25,445. I find that counsel's declaration is sufficiently detailed to allow me to make a fair evaluation of the time expended, and the nature and need for the service, and to draw a conclusion as to the reasonableness of the time spent on tasks for which he requests compensation.

Of the 143.89 hours, Intervenor seeks compensation for a total of 122.55 hours spent prosecuting this case, .2 hours spent sending a newspaper article to Mr. Evan and 21.14 hours spent on preparation of the fee petition.

The number of hours spent prosecuting the case (122.55), based on Intervenor's counsel's role in presenting the case and the short interval of his involvement, is excessive. Intervenor's counsel's motion to intervene was granted one week before trial. HUD had filed the charge a full one year before. At the time he joined HUD in this effort, HUD had completed its pretrial discovery and investigation and had announced its readiness for trial. Intervenor's counsel undertook no additional discovery.

Intervenor's counsel states that the 122.55 hours are justified because the issues the case presented were both novel and complex. He points to the novelty of the questions "what constitutes a request for 'reasonable accommodation'" and of the landlord's duty to respond to such requests. The undersigned does not agree that the issues were novel or especially complex. In any event, the issues cited pertain to establishing liability. Intervenor counsel's role, by his own statement, was to handle the issue of damages. The proof of damages in this case involved no novel or unusual aspects and required no extraordinary skill, especially by an attorney experienced in civil rights litigation. Therefore, Intervenor's explanation does not justify the number of hours claimed expended. A reduction in the number of hours requested is therefore warranted for duplication of effort. I have reduced the number of hours claimed expended by 40 percent, i.e., from 122.55 hours to 73 hours.

Intervenor seeks compensation for .2 hours spent by counsel for sending him a copy of a Sacto Bee article about the decision in this case. Compensation for this time spent is being disallowed as not a necessary or reasonable legal expense.

The number of hours expended on preparation of the fee petition is excessive. 21.14 hours were reportedly expended on research pertaining to, and drafting of, the fee application (more than 15% of the total claim). An application for fees need include no more than a summary of the black-letter law, along with supporting documents and itemized invoices. Where a contemporaneous record is kept of the time expended and the task performed, the itemization should take little time. Moreover, for one experienced in civil rights litigation, as petitioner's counsel is, it should take no more than one day (8 hours) to complete the appropriate level of research and prepare the application and supporting documents. *See HUD v. Kelly,* 2 Fair Housing-Fair Lending ¶ 25,114 (1995). The number of hours allowed will be reduced by 13.14, and the fee award will be reduced accordingly.

Intervenor will be compensated for a total of 81 hours for his attorney's participation in this case (73 + 8).[3]

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[3]A review of fee awards in HUD administrative cases shows that even the reduced number of 81 hours is higher than the number of hours approved in past cases where the extent of Intervenor's counsel's involvement was comparable to that in this case, i.e. participation through Initial Decision with no appeal:

20.75 hours in *HUD v. Webber;* 49.06 hours in *HUD v. Ro;* 53.6 hours in *HUD v. Joseph;* and 73.6 hours in *HUD v. Jankowski*. Although a higher number of hours has been found to be reasonable in other cases, these have involved substantially greater participation on the part of the intervenor. An administrative law judge approved 101.11 hours in *HUD v. Ocean Sands,* where intervenor participated through a second decision which followed a Secretarial remand and where, according to the ALJ, Intervenor's counsel "guided intervenor through the entire litigation process," 2 Fair Housing-Fair Lending at pg. 25,654. Also, an interim award of 95.25 attorney hours (+ 120 hrs for law clerk) was made in *HUD v. Jancik* when the Initial Decision was appealed and the case was then pending in the 7th Circuit, and of 202.6 hours in *HUD v. Kelly* where the intervenor's counsel was involved for nearly three years, through two ALJ decisions and two appeals to the 7th Circuit. The second appeal was pending at the time of the decision on the fee petition.

Fee Enhancement:

Intervenor's request for enhancement of the fee for contingency will be denied. The United States Supreme Court has ruled that fee-shifting statutes, including 42 U.S.C. § 1988, do not permit enhancement for contingency in an award of attorneys' fees for prevailing plaintiffs in civil rights cases. The Court reasoned that an enhancement of attorneys' fees beyond the lodestar amount for contingency would likely substantially duplicate factors already subsumed in the lodestar calculation *See City of Burlington v. Dague*, 505 U.S. 2641 (1992). Cases interpreting the Civil Rights Attorneys' Fees Act Amendment of 1976, 42 U.S.C. § 1988 ("CRA Fees Act") apply to the Fair Housing Act. *See* 42 U.S.C. § 3602(o); *see also* House Judiciary Committee, *Fair Housing Amendments Act* of 1988, H.R. Rep. No. 711, 100th Congress, 2d session 13; *reprinted in* 1988 U. S. C. C. A. N. 2173, 2174 (amendments to the Act make its fee provision similar to those in other civil rights statutes). *HUD v. Jancik*, 2 Fair Housing-Fair Lending ¶ 25,068 at pg. 25,642, n. 3.

Costs:

Intervenor claims that he incurred $192.79 in litigation expenses, including telephone, postage, and copying costs. Respondents have not challenged the accuracy of the expenditures and I find no basis to conclude that they are not so. Accordingly, $192.79 is awarded as reimbursement of expenses.

Conclusion and Order

Intervenor is entitled to attorneys fees at a rate of $200.00 per hour for 81 hours. Accordingly, within 45 days of the date this Initial Decision becomes final, Respondents are **ORDERED** to pay Intervenor a total of $16,392.79 for Mr. Grabill's attorneys' fees and costs ($16,200 in attorney fees, and $192.79 in litigation expenses).

CONSTANCE T. O'BRYANT
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION AND ORDER ON APPLICATION FOR ATTORNEY FEES issued by CONSTANCE T. O'BRYANT,